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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether bare, self-serving, conclusory assertions of damage by a party, which are totally uncorroborated by other evidence, constitute sufficient evidence to prove that the petitioner suffered antitrust injury as a proximate consequence of respondent's retail sales incentive programs?

2. Whether self-serving, unsupported assumptions may form the basis for calculating antitrust damages?

3. Whether there is sufficient evidence in the record to establish the amount of the antitrust damage sustained by the petitioner as a proximate consequence of respondent's retail sales incentive programs?

STATEMENT OF THE CASE

This is a §2(a) Robinson-Patman, 15 U.S.C. §13(a), case wherein the petitioner, J. Truett Payne Company, Inc. (hereinafter "Payne"), charged that indirect price discrimination resulted from certain retail sales incentive programs offered by Chrysler Motors Corporation (hereinafter "Chrysler"), to all of its dealers during the period December 26, 1970 through May 28, 1974. Chrysler offered some 19 retail sales incentive programs during this time period. (Def. Ex. 28, at A-2 of the Appendix to this brief).

These programs offered all Chrysler dealers monetary payments based on their retail sales of Chrysler's products. (Tr. 139). Payments were dependent on accomplishments against wholesale and/or retail objectives which Chrysler computed, according to uniform procedures, based on each dealer's market potential and/or the dealer's prior sales. (Tr. 105-06, 447, 463, 464). As a result, each dealer had an opportunity to participate in each program, and receive equal payments for comparable performance. (Tr. 473).

Similar programs are currently in use and have been widely used by U.S. and foreign automobile manufacturers and distributors for a long period of time. Both Ford and General Motors, Chrysler's chief competitors, offered similar retail sales incentive programs during the same time periods as the Chrysler programs in issue here. (Tr. 475-476).

Chrysler also offered two other types of programs which were interconnected with the retail sales incentive programs in issue and which resulted in monetary payments to Payne and the other Chrysler dealers in the Birmingham, Alabama metropolitan area. These programs were: (1) the 5% stock rebate program for 1972 and 1973 model vehicles; and (2) the fleet sales incentive programs.

Under the 5% stock rebate program, the dealer could receive a refund from Chrysler of 5% of the factory price on each new prior year model vehicle in the dealer's inventory on the announcement day of the new model. However, the 5% stock rebate was only available to dealers not participating in the retail sales incentive program being run at the close of the model year. In both 1972 and 1973, Payne received the 5% stock rebate rather than participating in the alternative retail sales incentive program. (Tr. 168-171, 178-180; Plt. Exs. 48, at 21 of the Appendix to the Petition, and 51, at 24 of the Appendix to the Petition). The money received by each of the four Chrysler dealers located in the Birmingham area from the retail sales incentive programs and the 5% stock rebate is set forth in Defendant's Exhibit 28, at A-2 of the Appendix to this brief.

Under the fleet sales incentive programs, dealers received monetary payments for their fleet sales. A sale qualified as a fleet sale if it was made to a qualified fleet purchaser (one who generally purchased in large numbers), such as the Alabama Power Company. Since fleet sales were covered by separate programs, they did not count toward a dealer's sales objective under the retail sales incentive programs. If a dealer concentrated his sales effort on fleet sales, he would usually reduce his ability to participate in the retail incentive programs. (Tr. 77-78, 103-105). During the period involved in this case, Payne worked hard to make fleet sales, and over 24% of Payne's new car sales were fleet sales. (Tr. 104; Def. Ex. 31, at A-3 of the Appendix to this brief). Payne received $62,185 under the fleet sales incentive programs, while the next highest Chrysler dealer in the Birmingham area received only $7,185. The total fleet incentive money received by each Chrysler dealer in the Birmingham area is set forth in Defendant's Exhibit 27, at A-1 of the Appendix to this brief.

Over the period involved in this action, Payne received more money under the retail, fleet, and 5% stock rebate programs than any of the other dealers in the Birmingham area. These dealers received the following amounts under these programs:

Dealer	Total Received
Payne	$161,122.75
Roebuck	141,590.00
Central	102,784.29
Vestavia	80,555.00

(Def. Exs. 27, at A-1 of the Appendix to this brief, and 28, at A-2 of the Appendix to this brief).

At page 6 of the Petition, Payne asserts that there is evidence in this case that Payne was injured by the retail sales incentive programs by losing sales and by having to force business and over-allow on used-car trade-ins to make sales. Whether there was probative evidence of these facts is the exact question which was presented to the Court of Appeals for the Fifth Circuit. The Fifth Circuit reviewed over 1400 pages of record and could find no probative evidence of such.

To support its statement that it lost sales, forced business, and over-allowed on trade-ins, Payne cites pages 35, 65-69, 91-92, 94-95, and 126-127 of the transcript. These pages contain no such evidence other than Mr. J. Truett Payne's self-serving, conclusory allegations. No evidence was ever introduced to support and corroborate Mr. Payne's bare assertions. No evidence was introduced of the price being charged for new cars by Payne and the other Chrysler dealers in the Birmingham area while the retail sales incentive programs were in progress. No evidence was introduced of the number of sales Payne allegedly lost as a result of the programs. No evidence was introduced of the profits

Payne allegedly lost from having to force business and over-allow on trade-ins. In fact, Mr. Payne admitted on cross-examination that he did not have any evidence that he lost sales because of the retail incentive programs. (Tr. 92-94). This, plus his testimony that the programs did not affect the price that the retail customer paid for a car (Tr. 85), demonstrates that the programs did not impair Payne's ability to compete in the Birmingham automobile market.

Besides Mr. Payne, the only other person to testify on behalf of Payne was Dr. George Ignatin, a professor of economics at the University of Alabama in Birmingham. Dr. Ignatin's testimony consisted in large part of explaining how he calculated what he contended to be the amount of the price discrimination effected by the retail sales incentive programs.[1] Dr. Ignatin claimed that Payne suffered price discrimination as a result of thirteen of the nineteen retail programs in a total amount of $81,248.94. (Tr. 191; Ptf. Exs. 37-54, at 10-27 of the Appendix to the Petition). Dr. Ignatin did not make any adjustment to this figure to reflect the times when Payne was the best performer under a program, or to reflect the money which Payne received under the fleet incentive programs.

At page 7 of the Petition, Payne sets forth the testimony of Dr. Ignatin concerning the *possible* effects which the re-

[1]Dr. Ignatin calculated what he contended to be the amount of the discrimination by dividing the incentive money received under a retail incentive program for sales of a particular car line by the number of such cars sold by the dealer during the program period. This gave Dr. Ignatin a figure which he called the "per unit rebate" for that car line. Dr. Ignatin performed this calculation for each car line on which separate incentive payments were made. He then compared the per unit rebate per car line which each dealer in the Birmingham area received under a program. If Payne did not receive the highest per unit rebate, Dr. Ignatin subtracted Payne's per unit rebate from the highest per unit rebate received by any dealer and multiplied the difference by the number of cars of that car line which Payne sold during that program period. Dr. Ignatin contended that this figure represented the amount of the price discrimination resulting from each program. (Tr. 228-229).

tail incentive programs could have on competition. However, there is absolutely no evidence in the record to show that any of these events actually happened or that the programs adversely affected the ability of any of the Chrysler dealers in the Birmingham automobile market to compete. In fact, Dr. Ignatin admitted that he had no evidence that any of the Chrysler dealers in the Birmingham area had discounted their retail price because of the incentive programs. (Tr. 255-256).

Throughout the Petition, Payne asserts that the competition among the four Chrysler dealers in the Birmingham area was exceedingly keen. There is no evidence in the record to support this claim except for Mr. Payne's bare assertion that competition among the dealers was *rough*. (Tr. 45). No evidence was introduced to corroborate Mr. Payne's allegation or to give any meaning to his characterization. Not even the minimal evidence of the price that Payne and the other Chrysler dealers were selling cars for was introduced.

In this case, the jury returned a verdict in favor of Payne for $111,247.48, and Chrysler appealed to the Fifth Circuit. Among the issues presented to the Fifth Circuit was whether the evidence was sufficient to prove: (1) that competition might be substantially lessened by the incentive programs;[2] and (2) that Payne had in fact suffered antitrust injury in an ascertainable amount as a proximate conse-

[2]Retail sales incentive programs identical in form to the programs involved in this case were considered in *Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D. Minn. 1980) and *Tosa Chrysler-Plymouth v. Chrysler Motors Corp.*, 1974 Trade Cases ¶75,006 (E.D. Wis. 1974). In both these cases the programs were challenged as violating §2(a) of Robinson-Patman, 15 U.S.C. §13(a), since the qualifying objectives for each dealer were different. The objectives, as in this case, were based on the individual dealer's market potential and/or his prior sales volume. In each case the court held that the necessary impact on competition had not been proven, since the assigned objectives were calculated in the same manner for each dealer and were therefore fair.

quence of the incentive programs. The Fifth Circuit did not reach the issue of whether there was sufficient evidence to establish that competition might be adversely affected since it found the evidence totally insufficient to prove that Payne suffered any antitrust injury, much less any ascertainable damage, as a proximate consequence of said programs.

ARGUMENT

I.

The Decision By The Fifth Circuit Is Clearly Correct.

It is well established law that in order for a private antitrust plaintiff to recover damages under §4 of the Clayton Act, 15 U.S.C. §15, said plaintiff must introduce substantial evidence that it suffered *antitrust* injury in some ascertainable amount as a proximate consequence of violations of the antitrust laws. This Court made this clear in its unanimous decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). This rule is just as applicable in a §2(a) Robinson-Patman, 15 U.S.C. §13(a), action as in any other type of antitrust case. As this Court stated in *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969):

> "Before an injured party can recover damages under the Act [referring to §2(a) of Robinson-Patman, 15 U.S.C. §13(a)]; he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered."

It has long been the holding of most courts which have considered the question that the necessary injury to authorize recovery of damages for a §2(a) Robinson-Patman violation is not established by merely proving the amount of the price discrimination; and since *Perkins* and *Brunswick*,

this appears to be the rule to which all the circuits are moving. *Zwicker v. J. I. Case Co.*, 596 F.2d 305 (8th Cir. 1979); *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975); *Morning Pioneer, Inc. v. Bismark Tribune Co.*, 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974); *Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973), *aff'g sub nom. McCaskill v. Texaco, Inc.*, 351 F. Supp. 1332 (S.D. Ala. 1972); *Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963); *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830 (3d Cir. 1961), *cert. denied*, 371 U.S. 829 (1962); *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961); *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951); *Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D. Minn. 1980); *Hasbrouck v. Texaco, Inc.*, 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980); *Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F. Supp. 243 (E.D. Pa. 1979); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F. Supp. 350 (S.D.N.Y. 1978). These cases hold that the antitrust injury suffered from illegal price discrimination is the profit lost by losing sales to the favored purchasers or from lowering one's price to match that of the favored purchaser.[3]

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[3]That this is the proper measure of the injury suffered in a price discrimination suit was made clear by Mr. Justice Cardozo who stated in *Interstate Commerce Commission v. United States*, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273 (1933), a case which did not purport to construe the Robinson-Patman Act but which is clearly analogous:

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. . . .
>
> Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When that rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the over-

At trial, Payne attempted to prove such impact on its business through self-serving, conclusory statements by Mr. Payne that the sales incentive programs caused him to lose sales (Tr. 65-67), to force business (Tr. 91-95, 126-127), and to over-allow on used-car trade-ins (Tr. 55, 711-712). There was absolutely no evidence introduced to corroborate any of these assertions by Mr. Payne. It is well established that uncorroborated, conclusory statements that one has been injured by violations of the antitrust laws are not sufficient to allow recovery of damages under §4 of the Clayton Act, 15 U.S.C. §15. *E.g., Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Dantzler v. Dictograph Products, Inc., supra*; *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Momand v. Universal Film Exchanges*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949).

The Fifth Circuit reviewed the over 1400 pages of record in this case and could not find any support for Mr. Payne's allegations of injury. In fact Mr. Payne discredited these assertions when he candidly admitted on cross-examination

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charge without other evidence of loss . . . . But a different measure of recovery is applicable where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less. . . . Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less. . . . *The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.*

. . . If by reason of the discrimination the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price, . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Id. at 389-91, 53 S.Ct. at 609-10 (emphasis added).

that he did not have any proof that he lost sales to any other Chrysler dealer because of the sales incentive programs (Tr. 92-94), and testified that he did not believe that the sales incentive programs had any impact on the price which the retail customer paid for Chrysler products (Tr. 85). Even Payne's expert admitted that he did not have any actual evidence that any of the other Chrysler dealers in the Birmingham area had discounted their retail price as a result of the sales incentive programs. (Tr. 255-256). Thus, the Fifth Circuit correctly reversed the jury verdict and directed judgment to be entered in favor of Chrysler.

On pages 16, 18 and 22 of the Petition, Payne argues that in this case it does not matter whether a favored dealer used its lower cost to try and attract additional sales or simply pocketed the extra profit to enhance its capital position. It is impossible to imagine how Payne's competitive position could have been injured if a favored dealer simply pocketed the savings and made no competitive use of it. The fact that such a dealer might be able to better withstand a weak economy is certainly not the type of injury with which §2(a) of the Robinson-Patman Act is concerned. If it was, there would be no need for the requirement in §2(a) of competitive injury because any price differential might enhance the capital position of the favored competitor.[4]

The Fifth Circuit's decision in no way infringes on this Court's decision in *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), as suggested by Payne in its Petition. In *Morton Salt*, this Court was only concerned with whether there was sufficient evidence to sup-

[4]When Payne talks of capital enhancement, it is merely trying to measure how much better off it would have been if it had paid the same price for new cars as the favored dealer. Such capital enhancement in no way measures how much worse off Payne was because competing dealers purchased cars for less, which is the test of injury in a price discrimination case. *Cf., Interstate Commerce Commission v. United States*, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273 (1933).

port an inference that the price differential *might* affect the ability of competitors to compete. The Court was not concerned with whether any of the disfavored competitors had been injured so as to authorize recovery of damages under §4 of the Clayton Act, 15 U.S.C. §15. The Fifth Circuit merely held that evidence which was sufficient to infer competitive injury under §2 (a) of Robinson-Patman was not necessarily sufficient to prove that said dealer's ability to compete was in fact injured so as to allow recovery under §4 of Clayton.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* this Court was presented with the precise question of whether proof of violation of an incipiency statute (like §2 (a) of Robinson-Patman) was sufficient to prove the necessary injury to authorize recovery of damages. This Court unanimously concluded that such proof was not necessarily sufficient. The Court stated:

> "Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that petitioner violated §7 [Clayton Act, 15 U.S.C. §18], since such proof establishes only that injury may result."

429 U.S. at 486, 97 S.Ct. at 696. Since Payne did not prove that its ability to compete was actually injured by the sales incentive programs, the Fifth Circuit's decision was clearly correct.

II.

There Is No Conflict Of Decisions.

In its Petition, Payne asserts that there is a conflict in the decisions as to whether actual antitrust injury must be

proven in a §2 (a) Robinson-Patman action in order to recover damages under §4 of the Clayton Act. Payne cites *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); *Grace v. E. J. Kozin Co.,* 538 F.2d 170 (7th Cir. 1976); *Fowler Manufacturing Co. v. Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); and *Elizabeth Arden Sales Corp. v. Gus Blass Co.,* 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945), as standing for the proposition that once an illegal price discrimination is shown the disfavored purchaser is entitled to automatic damages in the amount of the price discrimination without being required to prove that its ability to compete was in fact impaired. Such a holding would unquestionably be in conflict with the rule in the Second, Third, Fourth, Fifth and Sixth Circuits; however, it is submitted that these cases do not reflect the present state of the law in regard to what proof is necessary to recover damages for a violation of §2 (a) of the Robinson-Patman Act.

The Eighth Circuit case of *Elizabeth Arden Sales Corp. v. Gus Blass Co., supra,* is a §2 (d) and §2 (e) Robinson-Patman, 15 U.S.C. §13 (d), (e), case. Since it was not necessary for the plaintiff to prove any adverse effect on competition to establish a violation of §2 (d) or §2 (e), it would seem reasonable that the plaintiff could recover the amount of the discrimination in allowances and services without having to prove anything else. However, in a §2 (a) action, where the plaintiff must prove that the price discrimination might impair its ability to compete, the plaintiff must go forward and prove that such an injury did in fact occur. This was the holding of the Eighth Circuit in *American Can Co. v. Russellville Canning Co.,* 191 F.2d 38 (8th Cir. 1951), a §2 (a) Robinson-Patman case decided six years after *Elizabeth Arden.*

In *Russellville,* the Eighth Circuit reversed the trial court's award of damages in the amount of the price discrimination, since no evidence was introduced to show that the plaintiff lost business or profits as a proximate consequence of said discrimination. The Eighth Circuit stated:

> "It is our understanding that, in order for a plaintiff to recover damages in a case such as this [§2 (a) Robinson-Patman], it is not enough to show that a plaintiff was guilty of price discriminations which might lessen or injure competition, but it is also necessary for the plaintiff to prove that the wrong done proximately resulted in ascertainable damages to its business and property."

Id. at 54. *In accord, Zwicker v. J. I. Case Co.,* 596 F.2d 305 (8th Cir. 1979); *Morning Pioneer, Inc., v. Bismarck Tribune Co.,* 493 F.2d 383 (8th Cir. 1974); *Baxter Imports, Inc., v. Saab-Scania of America, Inc.,* 1980-2 Trade Cases ¶63,367 (D. Minn. 1980). Thus, it appears clear that *Elizabeth Arden* does not state the law in the Eighth Circuit as to what must be proven to recover damages for a violation of §2 (a) of Robinson-Patman.

In the recent decision of *Hasbrouck v. Texaco, Inc.,* 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980), Judge Callister pointed out that *Fowler Manufacturing Co. v. Gorlick, supra,* is no longer the law in the Ninth Circuit. Judge Callister emphasized that *Fowler* was decided prior to this Court's decision in *Perkins v. Standard Oil Co., supra,* and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* both of which are irreconcilable with the automatic damage rule announced in *Fowler.* Judge Callister also noted that since *Brunswick,* the Ninth Circuit has consistently held that damages do not automatically flow from proof of an antitrust violation, and that to recover damages the plaintiff must prove antitrust injury to its business or

property. *E.g., Handgards, Inc., v. Ethicon, Inc.,* 601 F.2d 986 (9th Cir. 1979); *Kapp v. National Football League,* 586 F.2d 644 (9th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979). Additionally, in *Rutledge v. Electric Hose & Rubber Co.,* 511 F.2d 668 (9th Cir. 1975), the Ninth Circuit indicated that *Fowler* is no longer the law by citing *Youngston v. Tidewater Oil Co.,* 166 F. Supp. 146 (D. Or. 1958), rather than *Fowler,* as stating the law as to what must be proven to recover damages for a violation of §2 (a) of the Robinson-Patman Act. In *Youngston,* the court stated:

> ". . . [T]o come within the reach of the provisions of the Robinson-Patman Act, one must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors due to one's inability to meet their prices, or both."

Id. at 147.

The Seventh Circuit decision in *Grace v. E. J. Kozin Co., supra,* does not indicate a conflict since it was a §2 (c) Robinson-Patman, 15 U.S.C. §13 (c), case. Like the situation in *Elizabeth Arden,* no competitive injury was required to prove a violation of §2 (c). Thus, in *Grace* the amount of the discriminatory allowance might well have represented the injury §2 (c) was designed to prevent. Chrysler is not aware of any Seventh Circuit case decided since this Court's *Brunswick* decision which discusses what must be proven to recover damages for a violation of §2 (a) of Robinson-Patman. However, there is no reason to think that the rule in the Seventh Circuit will be different from that of the other circuits.

The statement in *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947) (a 5 to 4 decision) that, in the absence of extraordinary circumstances, the amount of damages recoverable for illegal price

discrimination would be the amount of the discrimination, does not necessarily indicate a conflict with the Fifth Circuit's decision. This statement is purely dictum in response to an abstract argument by the petitioner that price discrimination ought to be a complete defense to an action to recover the cost of the product purchased, since it would be too difficult to prove consequential damages arising from the discrimination. Moreover, a reading of *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd* 187 F.2d 919 (5th Cir. 1951) suggests that there was evidence in the case before the Supreme Court that the price discrimination did result in lower prices by the favored competitors. Thus, the amount of the discrimination might very well have reflected the antitrust injury suffered. It would seem logical that the *extraordinary circumstances* which the Supreme Court had in mind in *Bruce's Juices* was the situation where no correlation between the price discrimination and the injury suffered was proven.

Further, this Court's decision in *Perkins v. Standard Oil Co., supra,* and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* makes it clear that a plaintiff is not entitled to recover automatic damages in the amount of the price discrimination simply by proving a violation of §2 (a) of Robinson-Patman. The plaintiff must go further and prove that antitrust injury did in fact occur. As stated by this Court in *Brunswick*:

> "The plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' "

429 U.S. at 489, 97 S.Ct. at 697.

Thus, in a §2 (a) Robinson-Patman case, the plaintiff must prove antitrust injury by showing that the favored competitor, by virtue of his lower cost, lowered his retail price or took other measures to attract sales, so that the plaintiff either lost sales or lost profits by matching this competition. This is the rule which the recent §2 (a) Robinson-Patman cases have been following. *E.g., Baxter Imports, Inc. v. Saab-Scania of America, Inc., supra; Hasbrouck v. Texaco, Inc., supra; Sweeney & Sons v. Texaco, Inc., supra; Uniroyal, Inc., v. Jetco Auto Service, Inc., supra.*

III.

This Is Not A Case Of National Importance.

The questions raised by the Petition have been presented to this Court on numerous occasions, and the Court has denied *certiorari* in each instance. *See, Fowler Manufacturing Co. v. Gorlick, supra; Dantzler v. Dictograph Products, Inc., supra; Freedman v. Philadelphia Terminals Auction Co., supra; Enterprise Industries, Inc., v. Texas Co., supra; Elizabeth Arden Sales Corp. v. Gus Blass Co., supra.* The obvious reason for the denial of *certiorari* is that resolution of the question of what proof is necessary to show antitrust injury, and what damages may be recovered for violation of the Robinson-Patman Act, will vary depending on the facts of each individual case. In some instances, the amount of the price discrimination might very well reflect the antitrust injury suffered by the plaintiff. However, in other instances, the amount of the price discrimination may not accurately reflect the injury and damages sustained by the disfavored competitor. Even the cases which Payne cites as supporting its automatic damage theory recognize this. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); *Fowler Manufacturing*

Co. v. Gorlick, supra at 1252 n.3; *Elizabeth Arden Sales Corp. v. Gus Blass Co., supra* at 996.

In this case, the Fifth Circuit merely held that what Payne claimed to be the amount of the price discrimination did not accurately reflect the antitrust injury which would be expected to flow from the sales incentive programs. Since Payne did not present any evidence of antitrust injury or the amount thereof, the Fifth Circuit correctly reversed the jury verdict and directed judgment be entered in favor of Chrysler. In essence, the Fifth Circuit's opinion is just a sufficiency of the evidence decision which does not warrant the attention of this Court. There is no pressing need for this Court to undertake the same review of over 1400 pages of record as performed by the Fifth Circuit to see if there was sufficient evidence to allow the case to go to the jury.

IV.

The Alleged Amount Of The Discrimination Does Not Reflect Antitrust Injury In This Case.

What Payne contends represents the amount of the price discrimination in no way reflects the antitrust injury which the sales incentive programs could have inflicted. This is self-evident from the manner in which Payne computed what it contends to be the amount of the discrimination. Payne determined this amount by calculating what it called the "rebate per unit sold" received by all Chrysler dealers in the Birmingham area under each retail incentive program. When Payne did not receive the highest rebate per unit, Payne took the difference between what it received per unit and the highest rebate per unit received by any of the other Chrysler dealers, and multiplied this difference by the number of such cars sold by Payne during the pro-

gram period. This calculation resulted in a total alleged discrimination of $81,248.94.[5]

The basic flaw with this method of calculating the effect of the discrimination is that it assumes that the more cars Payne sold during a program, the worse it was injured. Such an assumption is unrealistic since the more cars Payne sold, the less it could have been injured by the retail incentive programs. This is incontrovertible since over the period involved in this case, Payne averaged the highest gross profit on new retail sales of any of the Chrysler dealers in the Birmingham area. (Def. Ex. 31, at A-3 of the Appendix to this brief). Payne's method of calculating the amount of the discrimination is almost identical to the damage calculations made in *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974). The Third Circuit resoundingly rejected such damage calculations because they in no way reflected the injury which the antitrust violation could have inflicted.

Further, it is important to note that Payne did not make any adjustments to the claimed amount of the discrimination to reflect the occasions when Payne received the highest rebate per unit[6] or to reflect the money received under

[5]This calculation does not accurately reflect the amount of the price discrimination. In this case, Payne contended that the retail sales incentive programs were discriminatory because their qualification objectives were too high. (Tr. 57-58, 84-85, 102). Thus, the real amount of the discrimination would be the difference between what Payne actually received from participation in the retail incentive programs and what it would have received if its objectives had been non-discriminatory. Payne did not present any evidence of what this figure would have been.

[6]The 1971 Big Dollar Payoff is a good example of how Payne inflated his damage calculation by not making a credit adjustment when it received the highest per unit rebate. According to Payne's calculation it received $28.43 per unit for sales of Valiants while Roebuck Chrysler-Plymouth received $54.03 per unit. Since Payne sold 51 Valiants during the program, Payne contends that it suffered a discrimination of $1,305.65. However, on sales of all other car lines, which constituted most of the sales under the program, Payne received a per unit rebate of $107.98 com-

the fleet incentive programs. If Payne had deducted such payments from the claimed amount of the discrimination, Payne would not have had any significant amount of discrimination to complain about even under its erroneous method of calculating the amount of the discrimination.

Since the alleged discrimination of $81,248.94 in no way reflects the antitrust injury which one would expect to flow from the sales incentive programs, Payne's arguments in the Petition must fall.

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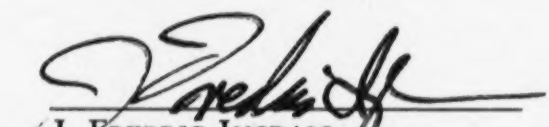
pared to $35.59 per unit for the next highest dealer Roebuck. Obviously, Payne was not injured by the program; nevertheless, Payne concluded that it suffered discrimination of $1,305.65 under the program. (Plt. Ex. 39, at 12 of the Appendix to the Petition).

CONCLUSION

This case does not present any issues of substantial importance to merit consideration by this Court. This is purely a sufficiency of the evidence case in which the Fifth Circuit correctly applied well established principles of law. For these reasons and the reasons set forth above, it is respectfully submitted that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,



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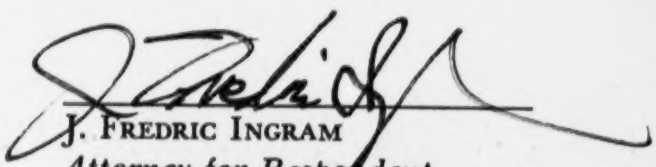
CERTIFICATE OF SERVICE

I, J. Fredric Ingram, attorney for Respondent, Chrysler Motors Corporation, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of July, 1980, I served three copies of the foregoing Brief In Opposition, together with the appendices thereto, by placing the same in the United States mail, with first class postage prepaid, in a duly addressed envelope, to Hon. Morris K. Sirote and Hon. C. Lee Reeves, 2222 Arlington Avenue, South, Birmingham, Alabama 35205, attorneys for Petitioner, J. Truett Payne Company, Inc.

It is further certified that all parties required to be served have been served.

This the 11th day of July, 1980.



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APPENDIX

BIRMINGHAM METRO FLEET COMPARISON

Year	Program	J. Truett Payne Co., Inc. 61-07178	Central Mtrs., Inc. 61-61635	Hall Mtr. Co. Vestavia C/P 61-62077	Roebuck C/P/IMP. 61-62694
1971-1972	Dealer Fleet Selling Plan — Rule 1	$19,935.00	$2,205.00	$ 665.00	$ 850.00
1973	Fleet Purchase Program				
	Dealer Selling Allowance	17,775.00	1,575.00	950.00	450.00
	Dealer Incentive Allow.	7,690.00			
1974	Fleet Purchase Program				
	Dealer Selling Allowance	12,945.00	1,405.00	110.00	4,345.00
	Dealer Incentive Allow.	3,840.00			1,540.00
	TOTAL	$62,185.00	$5,185.00	$1,725.00	$7,185.00

[Def. Ex. 27]

BIRMINGHAM METRO INCENTIVE COMPARISON

Program	J. Truett Payne Co., Inc. 61-07178	Central Mtrs., Inc. 61-61635	Hall Mtr. Co. Vestavia C/P 61-62077	Roebuck C/P/IMP. 61-62694
Winter Winners	$ -0-	$ 5,310.00	$ 3,015.00	$ 8,310.00
Big Dollar Payoff	23,850.00	1,931.25	3,900.00	12,025.00
Summer Sellout	3,040.00	5,660.00	5,925.00	12,800.00
Stock Eliminator	13,550.00	14,825.00	7,450.00	10,350.00
Winter Profit Days	-0-	-0-	4,450.00	6,525.00
Chrysler/Fury Profit	700.00	100.00	4,800.00	1,100.00
Sell Now	3,760.00	5,790.00	7,550.00	8,525.00
Summer Sweepstakes	-0-	25,695.00	18,540.00	26,095.00
Cash in With Chrysler	800.00	1,850.00	850.00	200.00
Clean Up & Cash In	3,400.00	6,800.00	4,000.00	3,400.00
Triple Pay	1,050.00	6,450.00	750.00	1,350.00
1972 5% Stock Rebate	9,689.20			
Twin Deal Dollars	200.00	200.00	-0-	5,000.00
Early Clean Up Bonus	-0-	-0-	17,600.00	16,325.00
1973 5% Stock Rebate	28,628.58	15,538.04	-0-	-0-
Cricket Profit Plus	200.00	100.00		
Super Earnings	4,670.00	-0-	OUT OF	10,850.00
Prime Rate on 8's	-0-	6,350.00	BUSINESS	10,250.00
"C" Body Bonus	5,400.00	800.00		1,000.00
"B" Body Bonus				
C/P Holiday Bonus		200.00		300.00
TOTAL	$98,937.78	$97,599.29	$78,830.00	$134,405.00

[Def. Ex. 28]

BIRMINGHAM METRO SALES COMPARISON Period 1971 - 1973

	NEW VEHICLES Sales			Average Gross Profit		Total Profit	
1971	Retail	Fleet	Total	Retail	Fleet	Gross	Net
J. Truett Payne Co.	562	161	723	390	208	$252,389	$ 72,215
Vestavia Chry.-Ply.	369	4*	373	385	na	143,492	48,788
Central Motors	467	16*	483	311	na	150,156	13,085
Roebuck Chry.-Ply.-Imp.	688	4*	692	335	na	232,054	17,779
1972							
J. Truett Payne Co.	576	185	761	425	242	289,579	104,700
Vestavia Chry.-Ply.	568	4*	572	435	na	248,651	113,118
Central Motors	585	17*	602	372	na	223,776	75,472
Roebuck Chry.-Ply.-Imp.	765	5*	770	342	na	263,485	20,455
1973							
J. Truett Payne Co.	567	210	777	435	312	312,008	110,853
Vestavia Chry.-Ply.	549	10*	559	361	na	201,641	23,164
Central Motors	399	20*	419	392	na	164,147	32,081
Roebuck Chry.-Ply.-Imp.	753	5*	758	380	na	287,787	36,248

*Dealer's financial statements do not reflect Fleet Sales. Fleet unit sales quantities obtained from the "Dealer Fleet Selling Plan Summary"

Period 1971 through 1973

	Total New Unit Sales	Total Fleet Unit Sales	Fleet Sales % of Total
J. Truett Payne Co.	2,261	547	24.2%
Vestavia Chry.-Ply.	1,504	18	1.1%
Central Motors	1,504	53	3.5%
Roebuck Chry.-Ply.-Imp.	2,220	14	.6%

[Def. Ex. 31]